No. 95-8836

In the Supreme Court of the United States

OCTOBER TERM, 1995

ELLIS WAYNE FELKER, PETITIONER

v.

TONY TURPIN, WARDEN, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AND ON PETITION FOR A WRIT OF HABEAS CORPUS

BRIEF FOR SENATOR ORRIN G. HATCH, SPEAKER NEWT GINGRICH, CONGRESSMEN DICK ARMEY, TOM DeLAY, HENRY HYDE, SENATORS STROM THURMOND, CHARLES GRASSLEY, FRED THOMPSON, JON KYL, SPENCER ABRAHAM, CONGRESSMEN BILL McCOLLUM, GEORGE W. GEKAS, CHARLES T. CANADY, BOB INGLIS, SONNY BONO, FREDERICK K. HEINEMAN, ED BRYANT, SENATORS JOHN ASHCROFT, ROBERT F. BENNETT, THAD COCHRAN, ALFONSE D'AMATO, LAUCH FAIRCLOTH, BILL FRIST, JAMES INHOFE, TRENT LOTT, DON NICKLES, HARRY REID, RICK SANTORUM, RICHARD C. SHELBY, BOB SMITH, AND JOHN W. WARNER, AND CONGRESSMEN WAYNE ALLARD, RICHARD H. BAKER, BOB BARR, JOE BARTON, DOUG BEREUTER, JOHN BOEHNER, BILL K. BREWSTER, JON CHRISTENSEN, TOM A. COBURN, CHRISTOPHER COX, BILL EMERSON, PHIL ENGLISH, MEL HANCOCK, JAMES V. HANSEN, STEPHEN HORN, TIM Y. HUTCHINSON, ERNEST J. ISTOOK, JR., STEVE LARGENT, FRANK D. LUCAS, RON PACKARD, NICK SMITH, J. C. WATTS, JR., AND DAVE WELDON, AS AMICI CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

Title I of the Antiterrorism and Effective Death Penalty Act of 1996 (Apr. 24, 1996) (the Antiterrorism Act) restricts the ability of a prisoner confined under the judgment of a state court to file a second or successive petition for a writ of habeas corpus. In particular, Section 106(b)(3)(C) of the Antiterrorism Act, 28 U.S.C. §2244(b)(3)(C), prohibits a state prisoner from filing a second or successive habeas corpus petition in district court unless the prisoner first establishes, to a panel of circuit court judges, a prima facie case for relief. The questions presented by this case are the following:

1. Whether application of Title I of the Act in this case amounts to a suspension of the writ of habeas corpus, in violation of the Suspension Clause of the Constitution, Art. I, §9, Cl. 2.

2. Whether Title I of the Act is an unconstitutional restriction on the appellate jurisdiction of this Court.

3. Whether Title I of the Act applies to habeas corpus petitions filed as original matters in this Court pursuant to 22 U.S.C. §2241.

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INTEREST OF THE AMICI

This case raises important questions regarding the constitutionally of Congress' authority under Article III of the Constitution, as implemented in the Antiterrorism and Effective Death Penalty Act of 1996 (Apr. 24, 1996), to limit jurisdiction of federal courts to adjudicate second

or successive habeas corpus petitions.[1] Amicus Orrin Hatch was the primary sponsor of the habeas corpus bill in the Senate and is the Chair of the Senate Committee on the Judiciary, the Committee with jurisdiction over the bill that became that Act. He and the other amici are is vitally interested in seeing that the constitutionality of the Act is upheld. Members of Congress have participated as amici curiae in other cases involving important issues affecting the legislative branch, both by consent and by motion. *E.g., National Org. For Women v. Idaho,* 455 U.S. 918 (1982); *United States v. Helstoski,* 442 U.S. 477 (1979).[2]

SUMMARY OF ARGUMENT

I. The Act does not violate the Suspension Clause. That Clause protects the right to seek habeas relief from executive detention without supporting judicial process. The Act regulates only the collateral attack process and does not modify the writ's historic function. Nor does it authorize executive detention. The Constitution does not require collateral review of the judgment of a court of competent jurisdiction, but Congress has provided such relief. Congress' decision to permit such review does not mean that a subsequent restriction violates the Suspension Clause.

II. The Act does not unconstitutionally restrict the appellate jurisdiction of this Court. A prisoner, like petitioner, already has had numerous opportunities for judicial review. He has had the ability to assert claims of fact and law before a trial judge, the state supreme court and this Court on direct review; before a state trial judge, the state supreme court, and this Court in a state collateral proceeding; and, finally, before a federal district court judge, a federal court of appeals, and this Court in a federal habeas corpus proceeding. Congress has plenary authority to adopt neutral procedures that govern how and when specific claims may be raised by the litigation. Congress therefore can legitimately help the States enforce their capital sentencing laws by regulating the collateral attack process.

[1] For convenience, hereafter we will refer only to a "second" habeas petition.

[2] We have filed letters of consent with the Clerk of this Court.

III. The Antiterrorism Act vests the circuit courts with authority to make the final determination whether an inmate may file a second habeas petition. This Court should not construe 28 U.S.C. §2241 as allowing petitioner to file a habeas petition to seek review of the judgment below and thereby frustrate this purpose of the Act.

ARGUMENT

THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT IS A CONSTITUTIONAL EXERCISE OF CONGRESS' ARTICLE III AUTHORITY TO REGULATE THE HABEAS JURISDICTION OF THE FEDERAL COURTS

After considering and debating the reform of federal habeas corpus for more than 15 years,[3] Congress enacted

[3] *See, e.g., Habeas Corpus; Hearings on S. 1314 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary,* 94th Cong., 2d Sess. (1976); *Federal Habeas Corpus; Hearing Before the Subcommittee on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary* 95th Cong., 2d Sess. (1978); *Habeas Corpus Procedures Amendments Act of 1981: Hearing on S. 653 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary,* 97th Cong., 1st Sess. (1981); *The Habeas Corpus Reform Act of 1982; Hearing on S. 2216 Before the Senate Comm. on the Judiciary,* 97th Cong., 2d Sess. (1982); *Federal Criminal Law Revision, Parts 2 & 3; Hearings on H.R. 1647, et al., Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary,* 97th Cong., 1st & 2d. Sess. (1981 & 1982); *Comprehensive Crime Control Act of 1983: Hearings on S. 829 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary,* 98th Cong., 1st. Sess. (1983); *Federalism and the Federal Judiciary: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary,* 98th Cong., 1st Sess. (1983); *Habeas Corpus Reform: Hearings Before the Senate Comm. on the Judiciary,* 99th Cong., 1st Sess. (1985); *Habeas Corpus Reform: Hearings on S. 88, S. 1757, and S. 1760 Before the Senate Comm. on the Judiciary,* 101st Cong., 1st & 2d Sess. 8 (1989) & 1990) (hereinafter *1990 Senate Hearings); Habeas Corpus Legislation: Hearings Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary,* 101st Cong., 2d Sess. (1990); *Fed-*

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the Antiterrorism and Effective Death Penalty Act of 1996 (the Antiterrorism Act). Frustrated by lengthy delays in the execution of validly imposed capital sentences, Congress enacted that law in order (among other things) to amend the statutory writ of habeas corpus as a means of helping the federal and state governments effectively implement their capital sentencing statutes, and thereby advance public safety, while preserving the ability of the common law writ of habeas corpus to serve its historic function of preventing unjustified executive detention. Those are interests of the highest order. The ability to resort to the writ to prevent executive detention without judicial process was an important development in Anglo-American legal history and always has stood as a centerpiece of our liberties. At the same time, it cannot be gainsaid that there is no more legitimate and necessary function for Congress and the States than to protect public safety. After all, "[t]he most basic function of any government'" is "'provi[sion] for the security of the individual and of his property,'" *Illinois v. Gates,* 462 U.S. 213, 237 (1983) (quoting *Miranda v. Arizona,* 384 U.S. 436, 539 (1966) (White, J., dissenting)), and government, whether federal, state, or local, has "a legitimate

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eral Courts Study Committee Implementation Act and Civil Justice Reform Act: Hearings Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the Senate Comm. on the Judiciary, 101st Cong., 2d Sess. (1990); *Violent Crime Control Act of 1991: Hearings on S. 618 and S. 635 Before the Senate Comm. on the Judiciary,* 102d Cong., 1st Sess. (1991); *Race Claims and Federal Habeas Corpus; Hearings Before the Subcomm. On Civil and Constitutional Rights of the House Comm. on the Judiciary,* 102d Cong., 1st. Sess. (1991); *Habeas Corpus Issues: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary,* 102d Cong., 1st Sess. (1991); *Innocence and the Death Penalty: Hearings on S. 221 Before the Senate Comm. on the Judiciary,* 103d Cong., 1st Sess. (1993); *Habeas Corpus: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary,* 103d Cong., 1st & 2d Sess. (1993 & 1994); *Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process: Hearings Before the Senate Comm. on the Judiciary,* 104th Cong., 1st Sess. (1995) (hereinafter *1995 Senate Hearing*).

and compelling state interest in protecting the community from crime * * *," *Schall v. Martin,* 467 U.S. 253, 264 (1984) (quoting *DeVeau v. Braisted,* 363 U.S. 144, 155 (1960)). The Federal Government and 39 States have enacted capital sentencing statutes to fulfill that responsibility, and they indisputably have a legitimate and compelling interest in enforcing those laws, *E.g., McCleskey v. Kemp,* 481 U.S. 279 (1987); *Gregg v. Georgia,* 428 U.S. 153 (1976).

The Antiterrorism Act is an historic, progressive reform of the statutory habeas corpus process. Among other things, it restricts a state prisoner's ability to hamstring a State's efforts to carry out a capital sentence by regulating his opportunity to file a second or successive habeas petition. Section 106(b)(3)(A) of the Act, 28 U.S.C. §2244(b)(3)(A), requires that a prisoner (like petitioner) obtain authorization from a federal court of appeals (here, the Eleventh Circuit) before he can file such a petition in district court. The Act bars a circuit court from authorizing such a filing unless the prisoner first establishes a prima facie case that he is entitled to relief. §106(b)(3)(C), 28 U.S.C. §2244(b)(3)(C). To make that showing, a prisoner must prove either (1) that "the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," or (2) both that "the factual predicate for the claim could not have been discovered through the exercise of due diligence" and that "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." §106(b)(2)(A)–(B), 28 U.S.C. §2244(b)(2)(A)–(B). The Act also makes clear that a circuit court's decision to approve or deny the filing of a second habeas petition is not subject to en bloc review by the full court of appeals or to certiorari review by this Court. §106(b)(3)(E), 28 U.S.C. §2244(b)(3)(E).

In this case, in December 1981, less than one year after being released from prison for an aggravated sodomy conviction, petitioner "used deception to lure Evelyn Joy Ludlam, a nineteen-year-old college student working as a waitress, to his residence. There, he forcibly subjected her to bondage, beating, rape, and sodomy".[4] Thereafter, petitioner "murdered her and threw her body in a creek".[5] Early in 1983, petitioner was convicted of capital murder in Georgia state court and was sentenced to death. After exhausting unsuccessfully his remedies on direct appeal, in state collateral proceedings, and in one round of federal habeas litigation,[6] petitioner sought to file a second habeas petition containing two new claims.[7] As required by the Antiterrorism Act, petitioner sought permission to file a second habeas petition from the Eleventh Circuit, which denied his request. *Felker v. Turpin,* No. 96–1077 (11th Cir. May 2, 1996).[8]

[4] *Felker v. Thomas,* 52 F.3d 907, 908 (11th Cir.), *supplemented,* 62 F.3d 342 (1995), *cert. denied,* 116 S. Ct. 956 (1996).

[5] *Id.*

[6] Petitioner appealed to the Georgia Supreme Court, which upheld his conviction and sentence. *Felker v. State,* 314 S.E.2d 621 (Ga. 1984). This Court denied review. 469 U.S. 873 (1984). Petitioner then filed a postconviction challenge in state court. The state trial court denied petitioner relief; the Georgia Supreme Court denied his petition to appeal that denial; and this Court denied certiorari, *Felker v. Zant,* 502 U.S. 1064 (1992). Thereafter, petitioner sought habeas relief in federal district court, which denied his request. The court of appeals affirmed the district court's judgment, *Felker v. Thomas,* 52 F.3d 907 (11th Cir.), *supplemented,* 62 F.3d 342 (1995), and this Court denied review, 116 S. Ct. 956 (1996).

[7] One was that the jury instructions at his trial on the "reasonable doubt" standard were invalid under *Cage v. Louisiana,* 498 U.S. 39 (1990). The other was that the Eighth and Fourteenth Amendments prohibit "a non-physician, state agent [from] provid[ing] the sole evidence" establishing the time of death. *Felker v. Turpin,* No. 96–1077, slip op. 6 (11th Circ. May 2, 1996).

[8] The court refused to allow petitioner to file his jury instruction claim, on the ground that he could have asserted that contention in his first habeas petition. Slip op. 5–6. The court denied petitioner the right to assert his second claim for the same reason and also because he impermissibly sought retroactive application of a new rule of constitutional law. *Id.* at 6–7. The court of appeals also rejected petitioner's claim that the habeas restrictions contained in the Antiterrorism Act are unconstitutional, on the ground that petitioner could not have obtained relief under pre-Act decisions, such as *Schlup v. Delo,* 115 S. Ct. 851 (1995), *Herrera v. Collins,* 506 U.S. 390 (1993), and *McCleskey v. Zant,* 499 U.S. 467 (1991). *Felker,* slip op. 7–23.

Petitioner renews in this Court the contentions that he raised in the Eleventh Circuit, and he also argues that the Antiterrorism Act is unconstitutional insofar as it denies him the right to seek review of the panel's ruling before the en banc Eleventh Circuit or in this Court. What is more, petitioner has sought to invoke the original jurisdiction of this Court as an alternative basis for obtaining habeas corpus relief. In its order granting certiorari and staying petitioner's execution, this Court directed the parties to address three questions involving the constitutionality of the Act. For the reasons explained below, there is no merit to petitioner's claims.

I. The Act Does Not Violate the Suspension Clause

The Antiterrorism Act does not suspend the writ of habeas corpus, in violation of the Suspension Clause. Throughout Anglo-American legal history, the concept of suspending the writ of habeas corpus has had a specific and quite limited meaning. Historically, the writ of habeas corpus was designed, not for use in reviewing a final judgment of conviction, but in preventing executive detention without judicial process or (to achieve that purpose) in determining whether a particular court had jurisdiction over a prisoner.[9] The Framers adopted the Suspen-

[9] The discussion below of habeas corpus and suspension is taken from 1 William Blackstone, *Commentaries* (transliteration provided) (1st ed. 1765–1769); William S. Church, *Habeas Corpus* 41–47 (2d ed. 1893); William F. Duker, *A Constitutional History Habeas Corpus* 141–49 (1980); Albert Glass, *Historical Aspects of Habeas Corpus,* 9 St. John's L. Rev. 55 (1934); 9 Sir William Holdsworth, *A History of English Law* 104–25 (2d ed. 1938); Rollin C. Hurd, *A Treatise on the Right of Personal Liberty and on the Writ of Habeas Corpus and the practice Connected with It with a View of the Law of Extradition of Fugitives* 116–128, 132–53 (2d ed. 1876); Edward Jenks, *The Story of Habeas*

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sion Clause to limit the circumstances in which executive detention would be permissible. They did not include within its compass restrictions on a federal court's ability to set aside a state court's final judgment in a criminal case. The writ of habeas corpus protected from suspension by the Constitution stems from the common law writ and does not relate to the modern, judicially-expanded, statutory writ. Accordingly, the Antiterrorism Act does not remotely implicate the concerns underlying the Suspension Clause, and the Act's application to petitioner is clearly valid.

A. The Suspension Clause Is Limited To Extrajudicial Detention

1. The early history of the writ in England is obscure, but by the 17th century the writ had become accepted as a mechanism for preventing illegal confinement by executive officials.[10] At the same time, the writ was not uniformly available; courts, for example, were powerless to issue the writ when not in session. The Crown not only exploited this defect, but also sought to imprison citizens

Corpus, 18 L. Q. Rev. 64 (1902); George F. Longsdorf, *Habeas Corpus: A Protean Writ and Remedy*, 8 F.R.D. 179 (1948); Badash K. Mian, *American Habeas Corpus: Law, History, and Politics* 101–52 (1984), and summarizes the discussion found in the addendum to the Brief for the United States in *Swain v. Presley*, 430 U.S. 372 (1977) (O.T. 1975, No. 75–811).

[10] Habeas corpus finds its ancestry in enactments as early as 1166 A.D., in the Assize of Clarendon, an early legislative enactment of King Henry II, which provided, in part, as follows: "And when a robber or murderer * * * has been arrested * * * if the justices are not about to come speedily enough into the country where they have been taken, let the sheriffs send word to the nearest justice by some well-informed person that they have arrested such men, and the justices shall send back word to the sheriffs informing them where they desire the men to be brought before them; and let the sheriffs bring them before the justices." *English Historical Documents* 408 (David Douglas & George W. Greenway eds. 1953). Writs providing for the release of unlawfully imprisoned persons were well known to courts of chancery and common law throughout the 14th and 15th centuries. For the next 200 years, common law courts invoked the writ in jurisdictional disputes with courts of chancery, admiralty, and the Star Chamber.

outside England and therefore beyond the writ's jurisdiction. To remedy those defects, Parliament enacted the Habeas Corpus Act of 1679, 31 Car. II, c. 2. That law stands as an historic protection against unjustified detention, but it excluded "[p]ersons convict or in execution by legal process" from the benefits of the Act. *Id.;* see § III. A person convicted by a court of competent jurisdiction was not deemed to be held in violation of the law.

History would not have treated regulation of a convicted prisoner's right to file a second habeas petition as a "suspension" of the writ. Suspension in England was a legislative enactment nullifying the effect of the Habeas Corpus Act of 1679, thereby allowing confinement without bail, indictment, or other judicial process. Parliament suspended the provisions of the Act on numerous occasions, usually for a limited class of persons, such as those suspected of treason.[11] Given that precedent, there is little doubt that the Framers would have considered the writ to be secure if a prisoner was given at least one opportunity to apply for release under it.

2. There is no indication that the Framers held a different understanding of the writ. On May 29, 1787, four days after the Philadelphia Convention was called to order, Charles Pinckney of South Carolina submitted his

[11] The Habeas Corpus Act was suspended because of conspiracies against the King in 1688, 1 Wm. & Mary I, c. 2, 7, 19, and again in 1696, 7 & 8 Wm. III, c. 11. Activities of the Jacobites resulted in suspension in 1714, 1722, and 1744. 1 Geo. I, st.2, c. 8, 30; 9 Geo. I, c. 1; 17 Geo. II, c. 6. *See King* v. *Earl of Orrery*, 88 Eng. Rep. 75 (1722). Parliament suspended the writ during the American Revolution for persons suspected of treason or piracy. 17 Geo. III, c. 9; 18 Geo. III, c.1; 19 Geo. III, c. 1; 20 Geo. III, c. 5; 21 Geo. III, c. 2; 22 Geo. III, c. 1; *see 2 Works of Edmund Burke* 1–42 (1839). A similar suspension occurred in Massachusetts shortly before the Constitutional Convention. During Shay's Rebellion in 1786–1787, the Massachusetts legislature suspended the privilege of the writ. The statute provided that "any person or persons whatsoever, whom the Governor and Council, shall deem the safety of the Commonwealth requires" would be "continued in imprisonment, without Bail or Mainprize, until he shall be discharged therefrom by order of the Governor, or of the General Court." Mass. Laws 1786, c. 41.

"Draught of a Federal Government," which included a federal writ of habeas corpus. 3 *The Records of the Federal Convention of 1787,* at 604–09 (Max Farrand ed. 1966) (hereinafter Farrand). Pinckney proposed inclusion of the following language: "The privileges of and benefits of the writ of habeas corpus shall be enjoyed in this government in the most expeditious and ample manner: and shall not be suspended by the legislature except upon the most urgent and pressing occasion and for a time period not exceeding—months." 2 Farrand 341. Debate on the proposal was limited,[12] but what was said does not indicate that it was meant to include collateral challenges to federal convictions, to say nothing of state court convictions. Recognizing that habeas corpus might need to be suspended during certain critical times, the Framers added, by a vote of seven States to three, the qualifying proviso: "unless in cases of rebellion or invasion the public safety may require it." This proposal, introduced by Gouverneur Morris, was a reworking of Charles Pinckney's original proposal to the Committee on Detail, and sparked the only debate on the writ. The debate in the Constitutional Convention focused not on whether a clause including the writ should be in the Constitution, but on whether a suspension clause was necessary and, if so, how it might be worded to grant maximum protection to citizens without jeopardizing the nation's security in the event of an emergency.

[12] James Madison's notes on the debate state the following:

Mr. Rutledge was for declaring the habeas corpus inviolate. He did not conceive that a suspension could ever be necessary, at the same time, through all the states.

Mr. Gouverneur Morris moved, that "the privilege of the writ of habeas corpus shall not be suspended, unless where, in cases of rebellion or invasion, the public safety may require it."

Mr. Wilson doubted whether in any case a suspension could be necessary, as the discretion now exists with judges, in most important cases, to keep in gaol or admit to bail.

5 *Debates on the Adoption of the Federal Constitution* 484 (J. Elliot ed. 1863).

As adopted, the Suspension Clause provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Art. 1, §9, Cl. 2. The Constitution, like the Habeas Act of 1679, did not create the writ of habeas corpus, nor did it define the scope of that writ. Rather, it assumed that the common law writ would be available by promising that it could not be suspended.[13] At the time of the Constitution's adoption, the rule at common law was that "once a person had been convicted by a superior court of general jurisdiction, a court disposing of a habeas corpus petition could not go behind the conviction for any purpose other than to verify the formal jurisdiction of the committing court." Dallin H. Oaks, *Legal History in the High Court—Habeas Corpus,* 64 Mich. L. Rev. 451, 468 (1966). The Framers were well acquainted with the common law writ's function as a means of protecting against unlawful executive detention. Accordingly, instead of spelling out what the writ entailed, the Framers instead chose to include language preventing Congress from suspending the writ except in extraordinary circumstances.

In sum, the Framers were concerned with restricting the legislative power, one that repeatedly had been exercised in England, to deny to entire categories of persons the ability to seek relief from executive detention through the writ. The Framers adopted the Suspension Clause to deal with that specific problem. The purpose of that Clause was to provide that such a total suspension could

[13] The Judiciary Act of 1789 authorized federal courts to issue "writs of * * * habeas corpus. * * * And that either the justices of the Supreme Court as well as the judges of the District Court, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment." Nonetheless, the Act forbade extension of the writ "to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States * * *." 1 Stat. 81. The federal judiciary thus had no authority to issue writs to citizens imprisoned under State authority.

occur only in time of war or rebellion, and even then only if the public safety required it.[14]

3. This Court's decisions demonstrate that the writ of habeas corpus protected by the Constitution does not encompass collateral review of convictions entered by courts of competent jurisdiction. This Court has long recognized that:

> Although the objective of the Great Writ long has been the liberation of those unlawfully imprisoned, at common law a judgment of conviction rendered by a court of general criminal jurisdiction was conclusive proof that confinement was legal. Such a judgment prevented issuance of the writ without more.

United States v. Hayman, 342 U.S. 205, 210–11 (1952) (footnote omitted). This Court's early decisions reflect a similar understanding, *e.g.*, *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201–03 (1830); *Ex parte Watkins*, 32 U.S. (7 Pet.) 568 (1834); *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 101 (1868); *see Frank v. Magnum*, 237 U.S. 309, 329–31 (1915), as do more recent cases, *e.g.*, *Wainwright v. Sykes*, 433 U.S. 72, 77–78 (1977).[15]

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[14] Subsequent history confirms that reading of the Suspension Clause. This power to suspend the privilege in time of war or rebellion has several times been exercised or sought to be exercised. In 1807, after the exposure of the Burr conspiracy, President Jefferson proposed a suspension of the writ for three months in cases of treason or other high crime or misdemeanor. The measure passed the Senate with one dissent, but it was defeated in the House. *See* 16 Annals of Congress 44, 402 et seq., 531–35 (1807); 3 Albert J. Beveridge, *Life of John Marshall* 343–48 (1919). President Lincoln, without legislative authority, suspended the writ or authorized its suspension on several occasions early in the Civil War. *See* 7 James D. Richardson, *A Compilation of the Messages and Papers of the Presidents, 1789–1902*, at 3217–20, 3240, 330, 3303–05, 3313, 3322 (1897); *Ex parte Merryman*, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9,487) (Taney, Circuit Justice). In 1863 Congress authorized suspension of the writ. Act of Mar. 3, 1863, 12 Stat. 755; *see also* 7 James D. Richardson, *supra*, at 3371–72 (Proclamation by the President of Sept. 15, 1863, suspending the privilege of the writ of habeas corpus throughout the United States).

[15] Judge Henry Friendly noted that "[i]t can scarcely be doubted that the writ protected by the suspension clause is the writ as known to the framers, not as Congress may have chosen to expand it or, more pertinently, as the Supreme Court has interpreted what Congress did." *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 170 (1970); *accord 1990 Senate Hearings* 31 (statement of Hon. Lewis Powell).

In this legislation, Congress, of course, has not limited statutory federal habeas review to its common law basis; nor has Congress elected altogether to abolish review of convictions entered by courts of competent jurisdiction. This Court need not, therefore, decide whether Congress could do so. In this Act, Congress has sought merely to set reasonable limits on the availability of post-conviction, collateral review, particularly second habeas petitions. Such legislation is entirely within Congress' prerogative and does not run afoul of the Suspension Clause.

For more than a century, this Court gradually expanded the federal courts' authority to review state court convictions, even though Congress did not change the relevant language of the habeas statutes in the interim. *See generally Sykes*, 433 U.S. at 77–80. This Court never has held that those expansions were constitutionally required. If so, then Congress clearly has the power to revise this Court's interpretation of the statutory writ. Otherwise, the Suspension Clause acts as a constitutional ratchet—permitting the courts to expand the scope of the writ, but then constitutionalizing each such expansion and placing it beyond further legislative action. Under that theory, the federal courts could usurp Congress' legislative power. Such a theory is neither jurisprudentially sound, nor appropriate as a matter of public policy. If this Court is not "imprisoned by every particular of habeas corpus as it existed in the late 18th and 19th centuries," *Schneckloth v. Bustamonte*, 412 U.S. 218, 256 (1973) (Powell, J., concurring), then neither is it imprisoned by every judicial expansion of the writ.

B. The Act Does Not Authorize Executive Detention

The Antiterrorism Act does not implicate the concerns prompting the Framers to adopt the Suspension Clause.

Nothing in the Act prevents a person from filing a habeas petition to inquire into the court's jurisdiction or, before trial, to challenge his arrest. As relevant here, the Act only limits a prisoner's ability to file a second habeas petition challenging his conviction. Even then, it only requires that he establish a prima facie case of success in order to seek such relief. The Act does not endorse executive detention without judicial process any more than this Court's decisions in *Wainwright v. Sykes* and *Teague v. Lane*, 489 U.S. 288 (1989), did so. For the same reasons that this Court's decisions did not violate the Suspension Clause, the Antiterrorism Act also does not.

II. The Act Does Not Unconstitutionally Restrict the Appellate Jurisdiction of This Court

A. Congress Has Broad Power To Regulate This Court's Appellate Jurisdiction

Constitutional analysis, like statutory interpretation, must begin with the text of the relevant provision, and "the plain language of the enacted text is the best indicator of intent." *Nixon v. United States*, 506 U.S. 224, 232 (1993). The text of Article III is illuminating in this regard. It provides that "[t]he judicial Power * * * shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," Art. III, § 1; it defines the type of cases over which "the judicial Power shall extend," Art. III, § 2, Cl. 1; and it distinguishes between the original and appellate jurisdiction of this Court, Art. III, § 2, Cl. 2. The Court's "original Jurisdiction" is limited to "all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party," while this Court's "appellate Jurisdiction" is subject to definition by Congress, which is empowered to make "such Exceptions, and under such Regulations," as the legislature deems fit. *Id.* Construing Article III, this Court repeatedly has held that

Congress has the power to limit the jurisdiction of the federal courts.[16]

Those principles apply fully in the case of statutory habeas corpus petitions. Federal courts cannot issue a writ of habeas corpus without express statutory authority, and Congress can refuse to grant federal courts the power to issue such writs. *Ex parte Bollman*, 8 U.S. (4 Cranch) 74, 93–94 (1807). As Chief Justice Marshall explained in *Ex parte Bollman*, "for the meaning of the term *habeas corpus*, resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law." 8 U.S. (4 Cranch) at 93–94. In recognition of the importance of limited postconviction review, Congress established the statutory system that has governed habeas corpus from more than a century. The Antiterrorism Act narrows the authority granted to the federal courts, while still providing avenues for relief.

Moreover, Congress can modify appellate jurisdiction granted to this Court in habeas cases. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869). In *McCardle*, this Court held that Congress by statute, Act of Mar. 27, 1868, 15 Stat. 44, could withdraw this Court's appellate jurisdiction over habeas petitions filed under the Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385 (Feb. 5, 1867) (codified at Rev.

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[16] *E.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301, 331 (1966); *Clark v. Gabriel*, 393 U.S. 256 (1968); *Bowles v. Willingham*, 321 U.S. 503 (1944); *Yakus v. United States*, 321 U.S. 414 (1944); *Lockerty v. Phillips*, 319 U.S. 182, 187–88 (1943); *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 129 (1941); *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938); *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922); *Hallowell v. Commons*, 239 U.S. 506, 509 (1916); *Stevenson v. Fain*, 195 U.S. 165, 167 (1904); *The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 251–52 (1868); *Sheldon v. Sill*, 49 U.S. (8 How.) 440, 448 (1850) ("Courts created by statute can have no jurisdiction but such as the statute confers."); *Carey v. Curtis*, 44 U.S. (3 How.) 244–45 (1845); *McIntire v. Wood*, 11 U.S. (7 Cranch) 503, 504 (1813); *United States v. Hudson*, 11 U.S. (7 Cranch) 31, 32 (1812); *Durousseau v. United States*, 10 U.S. (6 Cranch) 312, 312–13 (1812); *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 7, 11 (1799).

Stat. §766 (2d ed. 1878)). In the Court's words: "We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words." 74 U.S. (7 Wall.) at 514.

At the same time, this Court has said that Congress' Article III power is not boundless. *See Klein v. United States,* 80 U.S. (13 Wall.) 128 (1872).[17] In *Klein,* this Court recognized two limitations on Congress's Article III authority. *First,* Congress cannot exercise this Court's "judicial Power," Art. III, §1, by invoking its "legislative Power[]," Art. I, §1, to regulate the appellate jurisdiction

[17] In *Klein,* Congress attempted to deny members of the Confederacy the opportunity to sue for the return of property taken from them during the Civil War. The obstacle facing Congress was that President Andrew Johnson had granted members of the Confederacy a full and unconditional amnesty, which otherwise would have had the effect of allowing them to seek the proceeds of their property in the Court of Claims. In order to nullify the effect of President Johnson's pardon, Congress by statute provided, in effect, that proof of a pardon for participating in the Civil War "shall be conclusive evidence of the acts pardoned, but shall be null and void as evidence of the rights conferred by it." 80 U.S. (13 Wall.) at 144. The act also directed this Court to dismiss for want of jurisdiction any case in which the Court of Claims had entered judgment. *Id.* at 143. This Court refused to enforce the statute, on the ground that it was unconstitutional. The Court acknowledged that Congress had plenary authority to regulate the jurisdiction of lower federal courts, as well as the appellate jurisdiction of this Court. *Id.* at 145. Nevertheless, the Court concluded that the statute exceeded Congress's legislative power and sought, instead, to vest in Congress the judicial power to decide cases pending in this Court, because it, in effect, directed this Court to enter a specific judgment without altering the underlying substantive law. *Id.* at 146 ("What is this but to prescribe a rule for the decision of a cause in a particular way?"). In so doing, the Court noted, "Congress has inadvertently passed the limit which separates the legislative from the judicial power." *Id.* at 147. Equally objectionable, in the Court's view, was Congress's attempt to sap a Presidential pardon of the remedial effect guaranteed by Article II, *id.* at 147–48, a power that the Court previously had described as "unlimited" (except for "cases of impeachment") and "not subject to legislative control," *Ex parte Garland,* 71 U.S. (4 Wall.) 333, 380 (1866).

of this Court. 80 U.S. (13 Wall.) at 146–47; *see Plaut v. Spendthrift Farm,* 115 S. Ct. 1447, 1452 (1995) (so characterizing *Klein*); *cf. INS v. Chadha,* 462 U.S. 919 (1983) (Congress cannot veto decisions of executive officials); *Bowsher v. Synar,* 478 U.S. 714 (1986) (1983) (Congress cannot appoint executive officials). *Second,* Congress cannot exceed limitations on its Article III power stemming from an independent source, such as the President's Article II pardon power. 80 U.S. (13 Wall.) at 147–48; *cf. Adarand Constructors v. Pena,* 115 S. Ct. 2097 (1995) (Congress cannot discriminate in the exercise of its Commerce Clause power).

Here, that first limitation is inapposite. Congress has not itself sought to exercise the judicial power by deeming any category of claims nonmeritorious and directing this Court (or any other) to enter judgment. Instead, Congress has left to panels of appellate court judges selected by each circuit the responsibility to decide that issue on the law and facts of each case. Compare *Robertson v. Seattle Audubon Society,* 503 U.S. 429, 438 (1992) (Congress amended the underlying statute rather than "compel * * * findings or results under old law'). Accordingly, the question becomes whether the Antiterrorism Act violates an external limitation on Congress's Article III authority, similar to the President's Article II pardon power at stake in *Klein.* Since the Antiterrorism Act limits federal courts" ability to entertain a second habeas petition, the Act raises two issues in this regard. The first question is whether application of the Act to petitioner amounts to a suspension of the writ of habeas corpus, in violation of Art. I, §9, Cl. 2. As discussed above in Point I, the Act does not suspend the writ of habeas corpus. The second question is whether due process forbids Congress from requiring a prisoner, as an alternative to seeking relief in the state courts or the state clemency process, to make a prima facie showing of success before a federal circuit court in order to file a second habeas petition. As discussed below, that question must be answered in the negative.

B. Congress' Procedure For Adjudicating Second Habeas Petitions Does Not Violate The Due Process Clause

The Due Process Clause prohibits a State from punishing someone criminally until it has proved his guilt beyond a reasonable doubt at a trial held in accordance with relevant constitutional guarantees. *Bell v. Wolfish,* 441 U.S. 520, 535–36 & n.16 (1979). But the corollary is that once a person has been fairly convicted of an offense, he is eligible for and the government can impose whatever penalty is authorized by law for his crime, as long as that penalty is not cruel and unusual. *Chapman v. United States,* 500 U.S. 453, 465 (1991). The question, then, is whether due process requires that a prisoner, like petitioner—who already has had the opportunity to assert his claims of fact and law before a trial judge (in some states perhaps also a state intermediate appellate court), the state supreme court, and this Court on direct review; before a state trial judge (in some cases perhaps also a state intermediate appellate court), the state supreme court, and this Court in a state collateral proceeding; before a federal district court judge, a federal court of appeals, and this Court in a federal habeas corpus proceeding; and, finally, before a circuit court panel in a second federal habeas proceeding—be given yet another opportunity to present claims in a second habeas petition to this Court before his sentence can be carried out. We submit that the answer clearly and resoundingly is "no." The Antiterrorism Act cannot be held invalid under the Due Process Clause unless it "offend[s] some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental." *Medina v. California,* 505 U.S. 437, 445 (1992) (citation omitted). None of this Court's decisions supports such a claim.[18]

[18] It is procedural, not substantive, due process concerns that are at stake here. Parties like petitioner already have been convicted, so they no longer enjoy the presumption of innocence. *Barefoot v. Estelle,* 463 U.S. 880, 887 (1983). The question for them is whether they are entitled to judicial review of their claims, and that question raises only procedural due process concerns. *Herrera v. Collins,* 506 U.S. 390, 407 n.6 (1993).

1. Congress historically has exercised broad latitude to establish, as it found necessary, avenues for direct and collateral review of a judgment of conviction in a criminal case. For example, the Judiciary Act of 1789, § 14, 1 Stat. 81, did not establish a right to appeal a conviction in a criminal case. Congress did not create a general right to appeal in federal capital cases until 1889, Act of Feb. 6, 1889, § 6, 25 Stat. 655, 656, and Congress did not extend that right to all criminal cases until 1891, the Circuit Courts of Appeals (Evarts) Act, § 5, 26 Stat. 827 (1891). Postconviction review of federal or state court judgments by federal courts also was a late development. The Judiciary Act of 1789 authorized federal courts to issue writs of habeas corpus for prisoners in federal custody, but specifically excepted cases in which prisoners were in custody under or "by color of the authority of the United States * * *." Congress later extended the writ to federal officers in state custody for executing federal law, Act of Mar. 2, 1833, § 7, 4 Stat. 632, 634, and to foreign nationals held by state officers, Act of Aug. 29, 1842, 5 Stat. 539. The federal courts, however, could not review convictions entered by state courts until Congress passed the Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385 (codified at Rev. Stat. § 766 (2d ed. 1878)). *See* Dallin H. Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court,* 1962 Sup. Ct. Rev. 153, 180-82. Throughout that period, this Court never suggested that the Constitution required Congress to adopt postconviction procedures for federal or state prisoners, or to regulate the post-trial process in any particular manner.[19]

[19] Indeed, the contrary is true. For more than a century, the Court has made clear that a defendant does not have a constitutional right to appeal a conviction or sentence, let alone to challenge a conviction in habeas corpus proceedings. The Court first articulated that principle in *McKane v. Durston,* 153 U.S. 684 (1894). One year later, the Court applied it in a capital case. *Andrews v. Swartz,* 156 U.S. 272 (1895); *see also Bergemann v. Backer,* 157 U.S. 655, 659 (1895) (reject-

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The regulation of second habeas petitions contained in the Antiterrorism Act easily fits within that tradition. As relevant here, the Act limits only a prisoner's ability to litigate federal claims at the back end of what has become a long, multi-stage process by which capital cases are reviewed. The Act restricts a prisoner's right to file a second habeas petition challenging a state conviction. That restriction arises only after a prisoner has litigated unsuccessfully in pretrial, trial, post-trial, and direct appeal proceedings in state court; in post-conviction proceedings

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ing similar claim in a capital case); *Ex parte Gordon*, 66 U.S. 503 (1862) (there is no right to appeal in federal cases unless authorized by statute, even in a capital case); *cf. Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1863) (ruling that this Court lacks appellate jurisdiction over military courts-martial absent statutory authorization). Since then, the Court has reiterated that principle on numerous occasions. *See Kohl v. Lehlback*, 160 U.S. 293, 297, 299 (1895); *Murphy v. Massachusetts*, 177 U.S. 155, 158 (1900); *Reetz v. Michigan*, 188 U.S. 505, 508 (1903); *Frank v. Mangum*, 237 U.S. 309, 327 (1915); *Luckenbach S.S. Co. v. United States*, 272 U.S. 533, 536 (1926); Ohio ex rel. *Bryant v. Akron Metro. Dist.*, 281 U.S. 74, 80 (1930); *Willis v. Tennessee*, 296 U.S. 533 (1935); *District of Columbia v. Clawans*, 300 U.S. 617, 627 (1937); *Carter v. Illinois*, 329 U.S. 173, 175 (1946); *Brown v. Allen*, 344 U.S. 443, 486 n.36 (1953); *National Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37, 42 n.6 (1954); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (plurality opinion); *id.* at 21 (Frankfurter, J., concurring in the judgment); *Lindsey v. Normet*, 405 U.S. 56, 77 (1972); *Ortwein v. Schwab*, 410 U.S. 656, 660 (1973); *Ross v. Moffitt*, 417 U.S. 600, 606, 611 (1974); *Estelle v. Dorrough*, 420 U.S. 534, 536 (1975); *United States v. MacCollom*, 426 U.S. 317, 323 (1976) (plurality opinion); *Abney v. United States*, 431 U.S. 651, 656 (1977); *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *Evitts v. Lucey*, 469 U.S. 387, 393 (1985); *Pennsylvania v. Finley*, 481 U.S. 551, 555-556 (1987); *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (plurality opinion). The Court reaffirmed it last Term in *Goeke v. Branch*, 115 S. Ct. 1275, 1278 (1995), stating, in reliance on *McKane*, that "due process does not require a State to provide appellate process at all." In sum, this Court's precedents make clear that the Nation's history and traditions allow Congress broad leeway to regulate the statutory habeas corpus process. Of course, the amici firmly believe that a defendant's ability to pursue a direct appeal of his conviction and sentence is, as a matter of policy, a valuable component of our criminal justice system. Nothing in the Antiterrorism Act in any way limits that ability.

filed in state trial court and appealed through the state appellate system; and in an original round of litigation in habeas proceedings in federal district court and circuit court, with review available in this Court at the end of each of those rounds of proceedings. The Act does not regulate antecedent stages of the process, and it does not touch on the historic function of habeas corpus, viz., the use of the writ to obtain release from illegal executive detention.

2. The procedures in the Antiterrorism Act are reasonably designed to achieve the goals noted above. For example, the Act requires a prisoner seeking to file a second habeas petition to obtain authorization from a circuit court to do so by establishing a prima facie case that he is entitled to relief. That procedure is similar to one that Congress enacted in 1908 in the hope of achieving much the same purposes as the new law. Then, Congress adopted the probable cause requirement in 28 U.S.C. §2253. That law requires a prisoner, whose application for habeas relief has been denied by the district court, to obtain a certificate of probable cause to appeal from that court, from a circuit court (or judge thereof), or from this Court (or one of its Members) in order to perfect an appeal. Otherwise, neither a circuit court nor this Court could grant relief, since each one would lack jurisdiction over the prisoner's appeal.[20]

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[20] At that time, condemned state prisoners were abusing the then-existing version of the Habeas Corpus Act of 1867, Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 (codified at Rev. Stat. §766 (2d ed. 1878)), in order to forestall their execution. Section 1 authorized federal courts to review state court judgments and provided that any such judgment would be stayed automatically whenever a state prisoner filed a habeas petition until all federal proceedings had been completed. §1, 14 Stat. 386. The result was that state prisoners could fend off execution as long as they could file a last minute habeas petition before sentence was carried out. *E.g., Rogers v. Peck*, 199 U.S. 425 (1905); *Lambert v. Barrett*, 159 U.S. 660 (1895); *In re Shibuya Jugiro*, 140 U.S. 291 (1891). Concerned that condemned state inmates were frustrating the States ability to enforce their capital sentencing laws, in 1908 Con-

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The probable cause requirement of § 2253 may have served its intended purpose for most of this century, but that period is now long passed, for several reasons. Today, repetitive challenges to a prisoner's conviction or sentence have become the norm in capital cases.[21] Some

gress revised the Habeas Corpus Act of 1867 in two ways: It eliminated the automatic right to appeal the denial of a habeas petition to this Court, and it imposed the requirement, now found at 28 U.S.C. § 2253, that a prisoner obtain from this Court a certificate of probable cause to appeal. Act of Mar. 10, 1908, ch. 76, 35 Stat. 40; see H.R. Rep. No. 23, 60th Cong., 1st Sess. 1–2 (1908); 42 Cong. Rec. 608–09 (1908). A certificate of probable cause thus became a jurisdictional prerequisite for appealing to this Court a circuit court's denial of a state prisoner's habeas petition. *House v. Mayo*, 324 U.S. 42, 44 (1945); *Ex parte Patrick*, 212 U.S. 555 (1908); *Bilik v. Strassheim*, 212 U.S. 551 (1908). In 1925, as part of an overall modification of federal appellate jurisdiction, Congress extended the probable cause requirement to the courts of appeals. Act of Feb. 13, 1925, ch. 229, § 6(d), 43 Stat. 940; *see generally Davis v. Jacobs*, 454 U.S. 911, 916–17 (1981) (opinion of Rehnquist, J.); *Jeffries v. Barksdale*, 453 U.S. 914, 915 (1981) (opinion of Rehnquist, J.). In 1948, Congress retained the probable cause requirement in 28 U.S.C. § 2253 as part of an overall modification of the Judicial Code. *See* H.R. Rep. No. 308, 80th Cong., 1st Sess. A179–A80 (1947); Historical and Revision Notes Following 28 U.S.C. § 2253; *Barefoot v. Estelle*, 463 U.S. 880, 892 n.3 (1963); e.g., *Garrison v. Patterson*, 391 U.S. 464 (1968); *Carafas v. LaVallee*, 391 U.S. 234 (1968); *Nowakowski v. Maroney*, 386 U.S. 542 (1967). As this Court explained, the probable cause standard of 28 U.S.C. § 2253 "requires something more than the absence of frivolity" and also is "'a higher one than the "good faith" requirement"' to proceed in forma pauperis under 28 U.S.C. § 1915. *Barefoot*, 463 U.S. at 893 (citation omitted). Instead, "a certificate of probable cause requires a prisoner to make a "substantial showing of the denial of [a] federal right."' *Id.* (citation omitted).

[21] *See, e.g., 1995 Senate Hearing* 7 (statement of Sen. Specter) ("In a context where the delays average 9 years, and in some cases go on as long as 20 years, the death penalty, which should be the flagship of the criminal justice system, has become the laughingstock of the criminal justice system, and criminals get the impression—regrettably, the accurate impression—that the law will not be carried out."); *id.* at 33 (statement of Texas Attorney General Morales); *id.* at 37 (statement of Colorado Attorney General Norton) ("according to the Powell Committee, 40 percent, or almost half of the time, from the imposition of a death sentence to the time of execution is taken up by federal habeas review."); *id.* at 67 (statement of Sen. Thurmond); *1990 Senate*

condemned prisoners, by obtaining judicial review of their claims on dozens of occasions, have been able to delay their execution for more than a decade.[22] That has been the case even in cases involving heinous crimes with no doubt about the prisoner's guilt.[23] Moreover, in capital cases habeas actions often are filed shortly before a prisoner is scheduled to be executed, thereby creating a type of hydraulic pressure on the courts in the hope of staying

Hearings 43 (statement of Hon. Lewis Powell) ("Fairness also requires that if a prisoner's claims are found to be without merit, society is entitled to have a lawful penalty carried out without unreasonable delay."); *id.* at 65 ("The situation we now have with no limit on habeas corpus and none on capital habeas corpus cases, and lawyers being perfectly willing and able to exploit the opportunities they have for this sort of litigation, we have a system that simply is not working."); *id.* at 253 (statement of Hon. Paul Roney) ("There is no finality in death sentence litigation now. The only time anybody gets executed is during a lull in litigation."); *id.* at 283 (same) ("Everybody who has been executed in our circuit has had a second petition."); *id.* at 286 (statement of Sen. Humphrey); *id.* at 345, 346 (statement of Sen. Hatch); *id.* at 724, 725 (statement of Florida Gov. Martinez) ("Florida has had 21 executions since 1979. Those inmates spent an average of 8.3 years on death row, and an average of 10 years passed between the date of their crime and the date the sentence was finally carried out."). The Court's own cases also prove that point. *E.g., Vasquez v. Harris*, 503 U.S. 1000 (1992), and *Gomez v. United States District Court*, 503 U.S. 653 (1992) (fifth action for relief by condemned prisoner); *In re Blodgett*, 502 U.S. 236 (1992) (three habeas petitions by condemned prisoner); *McCleskey v. Bowers*, 501 U.S. 1281 (1991) (third habeas petition by condemned prisoner, filed after *McCleskey v. Zant*, 499 U.S. 467 (1991)); *Delo v. Stokes*, 495 U.S. 320 (1990) (fourth habeas petition by condemned prisoner).

[22] *1995 Senate Hearing* 1–3 (opening statement of Sen. Hatch); *1990 Senate Habeas Hearing* 345 (opening statement of Sen. Hatch). Indeed, some condemned prisoners have been able to delay their execution so long that they actually (and ironically) have claimed—in the teeth of both common sense and precedent, *cf. Rooney v. North Dakota*, 197 U.S. 319, 325 (1905)—that the delay itself prevented their sentence from ever being carried out. *See Lackey v. Collins*, 115 S. Ct. 1421 (1995) (memo. of Stevens, J.).

[23] The case of William Andrews is a good example. The long history of that case is discussed in *Andrews v. Deland*, 943 F.2d 1162 (10th Cir. 1991), *cert. denied*, 502 U.S. 1110 (1992), and *Andrews v. Carver*, 798 F. Supp. 659 (D. Utah 1992).

an execution.[24] Also, claims raised in successive petitions, or at the last minute, are not likely to be meritorious,[25] and may be motivated by nothing more than a desire for delay or improperly to obstruct the State's ability to carry out a lawful sentence.[26]

Congress was not alone in believing that the federal habeas process was in great need of reform in capital cases. The Ad Hoc Committee in Federal Habeas Corpus in Capital Cases, chaired by Retired Justice Lewis Powell, reached the same conclusion. It found that "our present system of multi-layered state and federal appeal and collateral review has led to piecemeal and repetitious litigation, and years of delay between sentencing and a judicial resolution as to whether the sentence was permissible under the law."[27] Not surprisingly, the Committee concluded that "[t]he resulting lack of finality undermines public confidence in our criminal justice system."[28]

[24] This Court has recognized that scenario. "A pattern seems to be developing in capital cases of multiple review in which claims that could have been presented years ago are brought forward—often in a piecemeal fashion—only after the execution date is set or becomes imminent." *Woodard v. Hutchins*, 464 U.S. 377, 380 (1984).

[25] *Powell Committee* 5.

[26] "'It is natural that counsel for the condemned in a capital case should lay hold of every ground which, in their judgment, might tend to the advantage of their client, but the administration of justice ought not to be interfered with on mere pretexts.'" *Barefoot*, 463 U.S. at 888 (quoting *Lambert v. Barrett*, 159 U.S. 660, 662 (1895)); *see also, e.g., 1990 Senate Hearings* 65 (statement of Hon. Lewis Powell); *id.* at 726 (statement of Florida Governor Martinez).

[27] Judicial Conference of the United States, *The Ad Hoc Committee on Federal Habeas Corpus in Capital Cases* 1 (Aug. 29, 1989) (hereinafter *Powell Committee*), reprinted in *Habeas Corpus Reform: Hearings on S. 88, S. 1757, and S. 1760 Before the Senate Comm. on the Judiciary*, 101st Cong., 1st & 2d Sess. 8 (1990) (hereinafter *1990 Senate Habeas Hearing*); *see also id.* ("much of the delay inherent in the present system is not needed for fairness."); *id.* at 10 ("since the Supreme Court's 1972 *Furman* decision only 116 executions have taken place. The shortest of these judicial proceedings required two years and nine months to complete. The longest covered a period of 14 years and six months. The length of the average proceeding was eight years and two months.").

Congress therefore acted rationally to reform the habeas system and to limit prisoners' ability to file second habeas petitions. The systemic costs to federalism of federal review of state court judgments always are great,[29] but those costs are higher still whenever a prisoner seeks relief in a second federal habeas petition.[30] The interests of prisoners and the States both must be considered. Congress is well situated to balance those competing interests and to ensure that the State's interests in the protection of public safety and in finality are given substantial weight in the balance. As Justice Cardozo once noted, "justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934). The Antiterrorism Act is a constitutional and laudable effort to achieve that end.

3. The Act also codifies and strengthens the deference standard adopted in *Teague v. Lane*, 489 U.S. 288 (1989). *Teague* held that federal courts cannot grant relief to a state prisoner by adopting a "new rule" of law when adju-

[28] *Id.*

[29] Federal review of a state court's judgment always is a serious intrusion on the sovereignty of "a coordinate jurisdiction within the federal system," *Sykes*, 433 U.S. at 88, and "entails significant costs," *Engle v. Isaac*, 456 U.S. 107, 126 (1982); *see also, e.g., Schneckloth v. Bustamonte*, 412 U.S. 218, 260–62 (1973) (Powell, J., concurring); Paul Bator, *Finality in Criminal Law and Federal Habeas Corpus For State Prisoners*, 76 Harv. L. Rev. 441 (1963); Hon. Henry Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970).

[30] *See, e.g., McCleskey v. Zant*, 499 U.S. 467 (1991); *Sawyer v. Whitley*, 505 U.S. 333 (1992). Repeated re-examination of the validity of a state court judgment betrays an unjustified lack of confidence in the ability of state judges to exercise their "primary authority for defining and enforcing the criminal law," *Engle*, 456 U.S. at 128, consistently with their oaths to uphold the Constitution, *McCleskey*, 499 U.S. at 487, while also exhibiting a distressing sense of condescension in the assertedly superior ability of federal judges to enforce federal law.

dicating a habeas corpus petition, and "[a] new rule for *Teague* purposes is one where "the result was not dictated by precedent existing at the time the defendant's conviction became final.'" *Goeke v. Branch,* 115 S. Ct. 1275, 1277 (1995) (quoting *Caspari v. Bohlen,* 114 S. Ct. 948, 953 (1994), quoting in turn *Teague,* 489 U.S. at 301 (plurality opinion) (emphasis deleted in *Goeke*)) *see also, e.g., Graham v Collins,* 113 S. Ct. 892, 897 (1993).[31] Since this Court adopted that standard, the Antiterrorism Act cannot be unconstitutional by incorporating it. To be sure, the Act imposes the additional limitation that only decisions by this Court can satisfy the "clearly established" rule. But this Court has never rejected such an approach to defining the *Teague* standard; its decisions applying *Teague* easily could be read as having endorsed such a standard by implication; and none of this Court's *Teague* decisions suggests that this Court would have acted unconstitutionally if it had adopted such a standard. Under these circumstances, the deference standard in the Antiterrorism Act should be upheld. It cannot be unconstitutional for Congress to adopt by statute a standard

[31] The relevant question under *Teague* is "whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution." *Goeke,* 115 S. Ct. at 1277 (quoting *Caspari v. Bohlen,* 114 S. Ct. at 953, quoting in turn *Saffle v. Parks,* 494 U.S. 484, 488 (1990)); *Gilmore v. Taylor,* 113 S. Ct. 2112, 2116 (1993); *Butler v. McKellar,* 494 U.S. 407, 412 (1990). "The new rule principle validates reasonable, good-faith interpretations of existing precedents made by state courts and thus effectuates the States" interest in the finality of criminal convictions and fosters comity between federal and state courts." *Gilmore,* 113 S. Ct. at 2116 (quoting *Butler,* 494 U.S. at 414; internal punctuation omitted). A claim that government conduct was "arbitrary," "conscience-shocking," or "interferes with fundamental rights'" is insufficient. *Goeke,* 115 S. Ct. at 1277; *see also Gilmore,* 113 S. Ct. at 2118-19. To show that existing precedent "dictated" a ruling in his favor, an inmate must prove that clearly established law left the courts with no alternative except to enter judgment in his favor. *Id.*

that this Court could have endorsed by interpreting prior law.[32]

[32] The Act also does not violate the Eighth Amendment. Neither the text nor the history of the Eighth Amendment contains any limitation on Congress' power to regulate the habeas process. Unlike the Jury Trial Clause of Article III, and the Fifth and Sixth Amendments, which set pretrial and trial procedures for criminal prosecutions, the Eighth Amendment imposes only substantive limitations on the power to confine a suspect before trial or, if he is convicted, to punish him afterwards. The history behind the Eighth Amendment also reveals that this provision was designed to regulate the actual punishments carried out, rather than the procedures by which those penalties were imposed, and certainly not any post-trial procedures by which a conviction or sentence was reviewed. The phrase "cruel and unusual punishments" traces its lineage to the English Bill of Rights of 1689, 1 Wm. & Mary, Sess. 2, ch. 2. While historians disagree over the precise events that triggered the adoption of that provision, they agree that it was directed against unauthorized and perhaps grossly disproportionate penalties. The Cruel and Unusual Punishments Clause of the Eighth Amendment was taken verbatim from that law, in all likelihood, in order to meet complaints voiced in state ratifying conventions that the Constitution did not limit the penalties that Congress could impose. *Harmelin v. Michigan,* 501 U.S. 957, 979-80 (1991) (opinion of Scalia, J.); *Gregg v. Georgia,* 428 U.S. 153, 169-70 n.17 (1976) (lead opinion); Granucci, *"Nor Cruel and Unusual Punishments Inflicted': The Original Meaning,* 57 Calif. L. Rev. 839 (1969). That conclusion is buttressed by the judicial interpretations of the Eighth Amendment and its state counterparts. State courts in the 19th century construed such provisions as prohibiting only certain types of punishment. *See, e.g., Harmelin,* 501 U.S. at 980-81 (opinion of Scalia, J.) (collecting 19th century state court decisions).

To be sure, this Court's decisions have regulated some aspects of the sentencing process that the federal and state governments must follow in order to ensure that the death penalty is not imposed arbitrarily. *E.g., McKoy v. North Carolina,* 494 U.S. 433 (1990); *Godfrey v. Georgia,* 446 U.S. 420 (1980); *Furman v. Georgia,* 408 U.S. 238 (1972). But these decisions regulate only the *trial* procedures to be followed, not *appellate or postconviction* procedures. Indeed, on every occasion on which the claim was advanced, this Court has rejected the argument that the Eighth Amendment requires appellate courts to review capital sentences to ensure that they are not imposed arbitrarily at the trial level. *Lewis v. Jeffers,* 497 U.S. 764, 779-80 (1990); *Walton v. Arizona,* 497 U.S. 639, 654 (1990); *McCleskey v. Kemf, supra; Pulley v. Harris,* 465 U.S. 37, 44-51 (1984); *see Jurek v. Texas,* 428 U.S. 262

Continued

III. This Court Should Not Review Petitioner's Habeas Petition Under 28 U.S.C. §2241

This Court has appellate jurisdiction to review a judgment entered by a circuit court under 28 U.S.C. §1254(1). The last question is whether the Act applies to habeas corpus petitions filed in this Court under 22 U.S.C. §2241 seeking review of a prisoner's conviction.[33] We submit that it does.[34]

(1976) (by implication); Gregg, 428 U.S. at 188-95 (lead opinion) (same). Accordingly, this Court's decisions add nothing to the text or history of the Eighth Amendment, and neither of them reveals any constitutional flaw in the Antiterrorism Act.

[33] In some cases this Court has used writs, such as the writ of habeas corpus, as a means of reviewing lower court judgments. *See generally* Dallin Oaks, *The "Original Writ" of Habeas Corpus in the Supreme Court,* 1962 Sup. Ct. Rev. 153.

[34] As an antecedent matter, it is clear that this Court does not have original jurisdiction over habeas petitions. Under *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803), Congress cannot add to this Court's original jurisdiction in Art. III, §2, Cl. 2, and that provision does not vest this Court with original jurisdiction over cases like this one. The only arguably relevant part of that provision is the reference to "all Cases * * * in which a State shall be party," but that phrase does not aid petitioner. (Originally, Art. III, §2, Cl. 1, also referred to controversies "between a State and Citizens of another State" and "between a state, or the Citizens thereof, and foreign States, Citizens or Subjects." The Eleventh Amendment, however, repealed those jurisdictional grants.) The sentence containing that phrase refers to the jurisdictional grant in Art. III, §2, Cl. 1, and that provision is limited to "Controversies between two or more States." Thus, Congress could not have granted this Court original jurisdiction in §§2241 or 2254. Moreover, this Court made clear in *Ex parte Bollman* that habeas jurisdiction is necessarily "appellate" for Article III purposes, because it contemplates (by definition) that a prior court has entered the judgment under review. 8 U.S. (4 Cranch) at 101 ("It is the revision of a decision of an inferior court, by which a citizen has been committed to jail."). Finally, if there were doubt on this score, the Court should construe §2241 in a manner that ensures its constitutionality. It is a cardinal rule of statutory interpretation that, when doubt arises as to a statute's meaning, Acts of Congress should be construed to be constitutional. *E.g., Public Citizen v. Department of Justice,* 491 U.S. 440 (1989). Here, that canon strongly militates in favor of construing §2241 as discussed above, since otherwise that statute would be unconstitutional under *Marbury v. Madison.*

The Antiterrorism Act clearly sought to channel all second habeas petitions to the circuit courts and just as clearly denied this Court the opportunity to review a circuit court's ruling on such a request, at the behest of the inmate or the State, by certiorari under 28 U.S.C. §1254(1). The Act is materially different from the probable cause provisions of 28 U.S.C. §2253, which allows circuit courts, this Court, or the members of either, to grant a prisoner a certificate of probable cause if the district court has refused to do so. Not only are circuit courts gatekeepers for second habeas petitions, but their decisions on the matter are final. Accordingly, if a circuit court has denied a prisoner the right to file a second petition in district court, it makes no sense to conclude that this Court still may consider a second habeas petition through some means, such as §2241, other than a statutory writ of certiorari under §1254(1). Interpreting §2241 in that manner would nullify the gatekeeper provision of the Antiterrorism Act. For that reason, and since the Act is later-in-time and more specific than §2241, the Court should read the Act as precluding review in this Court of a circuit court's ruling on a second habeas petition under *any* writ. *See, e.g., Robertson,* 503 U.S. at 440 (canon that "specific provisions qualify general ones"); *cf. Carlisle v. United States,* No. 94–9247 (Apr. 29, 1996), slip op. 13.

CONCLUSION

The judgment of the court of appeals should be affirmed, and the petition for a writ of habeas corpus should be denied.

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